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8 **BEFORE THE**
9 **BOARD OF REGISTERED NURSING**
10 **DEPARTMENT OF CONSUMER AFFAIRS**
11 **STATE OF CALIFORNIA**

12 In the Matter of the Accusation Against:

Case No. 2013-266

13 **DAVID MICHAEL GARDNER**
14 **3040 Spruce Street**
15 **Bakersfield, CA 93301**

DEFAULT DECISION AND ORDER

16 **Registered Nurse License No. 644858**

[Gov. Code, §11520]

17 Respondent.

18 **FINDINGS OF FACT**

19 1. On or about October 11, 2012, Complainant Louise R. Bailey, M.Ed., R.N., in her
20 official capacity as the Executive Officer of the Board of Registered Nursing, Department of
21 Consumer Affairs, filed Accusation No. 2013-266 against David Michael Gardner (Respondent)
22 before the Board of Registered Nursing. (Accusation attached as Exhibit A.)

23 2. On or about September 15, 2004, the Board of Registered Nursing (Board) issued
24 Registered Nurse License No. 644858 to Respondent. The Registered Nurse License was in full
25 force and effect at all times relevant herein, and expired on July 31, 2012, and has not been
26 renewed.

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1 3. On or about October 11, 2012, Respondent was served by Certified Mail and First
2 Class Mail copies of the Accusation No. 2013-266, Statement to Respondent, Notice of Defense,
3 Request for Discovery, and Discovery Statutes (Government Code sections 11507.5, 11507.6,
4 and 11507.7) at Respondent's address of record which, pursuant to California Code of
5 Regulations, title 16, section 1409.1, is required to be reported and maintained with the Board.
6 Respondent's address of record was and is:

7 3040 Spruce Street
8 Bakersfield, CA 93301.

9 4. Service of the Accusation was effective as a matter of law under the provisions of
10 Government Code section 11505, subdivision (c) and/or Business & Professions Code section
11 124.

12 5. The aforementioned documents were returned by the U.S. Postal Service marked as
13 "Unclaimed" and as "Not Deliverable as Addressed, Unable to Forward" in October of 2012.

14 6. Government Code section 11506 states, in pertinent part:

15 (c) The respondent shall be entitled to a hearing on the merits if the respondent
16 files a notice of defense, and the notice shall be deemed a specific denial of all parts
17 of the accusation not expressly admitted. Failure to file a notice of defense shall
18 constitute a waiver of respondent's right to a hearing, but the agency in its discretion
19 may nevertheless grant a hearing.

20 7. Respondent failed to file a Notice of Defense within 15 days after service upon him
21 of the Accusation, and therefore waived his right to a hearing on the merits of Accusation No.
22 2013-266.

23 8. California Government Code section 11520 states, in pertinent part:

24 (a) If the respondent either fails to file a notice of defense or to appear at the
25 hearing, the agency may take action based upon the respondent's express admissions
26 or upon other evidence and affidavits may be used as evidence without any notice to
27 respondent.
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1 9. Pursuant to its authority under Government Code section 11520, the Board finds
2 Respondent is in default. The Board will take action without further hearing and, based on the
3 relevant evidence contained in the Default Decision Evidence Packet in this matter, as well as
4 taking official notice of all the investigatory reports, exhibits and statements contained therein on
5 file at the Board's offices regarding the allegations contained in Accusation No. 2013-266, finds
6 that the charges and allegations in Accusation No. 2013-266, are separately and severally, found
7 to be true and correct by clear and convincing evidence.

8 10. Taking official notice of its own internal records, pursuant to Business and
9 Professions Code section 125.3, it is hereby determined that the reasonable costs for Investigation
10 and Enforcement is \$9,590.50 as of November 16, 2012.

11 DETERMINATION OF ISSUES

12 1. Based on the foregoing findings of fact, Respondent David Michael Gardner has
13 subjected his Registered Nurse License No. 644858 to discipline.

14 2. The agency has jurisdiction to adjudicate this case by default.

15 3. The Board of Registered Nursing is authorized to revoke Respondent's Registered
16 Nurse License based upon the following violations alleged in the Accusation which are supported
17 by the evidence contained in the Default Decision Evidence Packet in this case:

18 a. Respondent is subject to disciplinary action for unprofessional conduct for
19 dangerous use of a controlled substance under section 2761, subdivision (a), and section 2762,
20 subdivision (b) because on or about March 25, 2011, while on duty as a nurse at the Mercy
21 Hospital located in Bakersfield, California, Respondent used and was under the influence of a
22 controlled substance, heroin and cocaine, in a manner dangerous to himself, his patients, and
23 others, as demonstrated by Respondent's constricted pupils and slurred speech. The
24 circumstances are as follows:

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1 (1) On March 25, 2011, Respondent began his shift at 4:00 p.m. at the
2 emergency room of Mercy Hospital and assumed the care of three patients. On that same date, at
3 approximately 5:00 p.m., charge nurse SS was supervising Respondent and noticed that
4 Respondent had failed to discharge a patient in a timely manner even after he reminded
5 Respondent to do so. Charge nurse SS also noticed that Respondent was standing at the nurses'
6 station leaning against the counter as he was dozing in and out of sleep. His eyes were closed
7 and his head was bouncing up and down as if he was trying to stop himself from falling asleep.
8 Respondent appeared to be agitated while he was walking around and, when he would stop
9 walking, he would immediately dose off. SS believed Respondent was under the influence of
10 some medication or drug and unable to provide adequate care for his patients at the time. Charge
11 nurse SS was approached by staff members who advised him that Respondent appeared impaired.
12 At approximately 5:40 p.m., charge nurse SS confronted Respondent regarding his behavior.
13 Respondent indicated that he was fine and was just tired.

14 (2) On that same date, Dr. B was on duty as the emergency physician at the
15 hospital. During his shift, Dr. B had been approached by staff members advising him that
16 Respondent appeared impaired. Dr. B began to observe Respondent's behavior and noticed that
17 Respondent needed to be in constant motion or he would drift off to sleep within a few seconds.
18 Respondent would try not to fall asleep by going from task to task without finishing any
19 particular task, including attempting to chart on the computer. When Respondent noticed Dr. B
20 observing him, Respondent advised Dr. B that he had a hard time waking up, and then went to get
21 a soda. Dr. B then observed Respondent pouring a soda into a small cup and before the cup was
22 full, Respondent dosed off and almost spilled the soda. When Dr. B confronted Respondent
23 regarding his behavior, Respondent indicated that he was tired from his children keeping him up
24 at night. Dr. B observed that Respondent's eyes were glassy and his pupils were very constricted.

25 (3) At approximately 5:50 p.m., Dr. B, accompanied by charge nurse SS,
26 asked Respondent to go into the medication room. Respondent was again confronted by Dr. B
27 and charge nurse SS about his condition. Respondent began to sweat profusely and became
28 shaky. Dr. B advised Respondent that he would not be allowed to care for patients in his

1 condition and requested that Respondent submit to a drug test. Respondent agreed to take the
2 test, however, when Dr. B went to arrange the test and charge nurse SS went to call the director of
3 the Hospital, Respondent fled the hospital before taking the test. Respondent left the hospital and
4 abandoned the three patients he was treating. Prior to leaving the hospital, Respondent did not
5 hand over the care of his patients, did not report to any staff about the status of his patients, and
6 did not report the fact that he would be leaving. Mercy Hospital terminated Respondent on
7 March 30, 2011 as a result of the March 25, 2011 incident.

8 b. Respondent is also subject to disciplinary action for unprofessional conduct for
9 dangerous use of a controlled substance under section 2761, subdivision (a), and section 2762,
10 subdivision (b) because in late June of 2011, while on duty as a nurse at San Joaquin Community
11 Hospital, Respondent used and was under the influence of a controlled substance and, following a
12 drug test, tested positive for morphine and codeine. The circumstances are as follows:

13 (1) In late June of 2011, Respondent became employed at San Joaquin
14 Community Hospital. Respondent was asked to take a drug test after a drug discrepancy was
15 found. Respondent tested positive for morphine and codeine and was terminated from his
16 employment. In a subsequent interview with a Board investigator in June of 2012, Respondent
17 admitted to using Heroin heavily during March of 2011. He admitted to using heroin for several
18 months and using up to a gram of heroin a day. Respondent also admitted to using cocaine during
19 this period. Respondent admitted that he last used cocaine and heroin on July 13, 2011. He
20 further admitted that he endangered his patients by being under the influence while on duty.

21 c. Respondent is subject to disciplinary action under section 2761, subdivision (d),
22 in that Respondent violated the Nursing Practice Act in that Respondent used and was under the
23 influence of a controlled substance in a manner dangerous to himself, his patients, and others.
24 Complainant also refers to and incorporates all the allegations contained in paragraph 3 a-b
25 above, as though fully set forth herein.

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ORDER

IT IS SO ORDERED that Registered Nurse License No. 644858, heretofore issued to Respondent David Michael Gardner, is revoked.

Pursuant to Government Code section 11520, subdivision (c), Respondent may serve a written motion requesting that the Decision be vacated and stating the grounds relied on within seven (7) days after service of the Decision on Respondent. The agency in its discretion may vacate the Decision and grant a hearing on a showing of good cause, as defined in the statute.

This Decision shall become effective on APRIL 11, 2013.

It is so ORDERED MARCH 12, 2013.


FOR THE BOARD OF REGISTERED NURSING
DEPARTMENT OF CONSUMER AFFAIRS.

51193941.DOC
DOJ Matter ID:LA2012507658

Attachment:
Exhibit A: Accusation

Exhibit A

Accusation

1 KAMALA D. HARRIS
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2 GREGORY J. SALUTE
Supervising Deputy Attorney General
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Deputy Attorney General
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7 *Attorneys for Complainant*

8 **BEFORE THE**
BOARD OF REGISTERED NURSING
9 **DEPARTMENT OF CONSUMER AFFAIRS**
10 **STATE OF CALIFORNIA**

11 In the Matter of the Accusation Against:

Case No. 2013-266

12 **DAVID MICHAEL GARDNER**
13 **3040 Spruce Street**
Bakersfield, CA 93301

A C C U S A T I O N

14 **Registered Nurse License No. 644858**

15 Respondent.

16
17 Complainant alleges:

18 **PARTIES**

19 1. Louise R. Bailey, M.Ed., RN (Complainant) brings this Accusation solely in her
20 official capacity as the Executive Officer of the Board of Registered Nursing, Department of
21 Consumer Affairs.

22 2. On or about September 15, 2004, the Board of Registered Nursing issued Registered
23 Nurse License Number 644858 to David Michael Gardner (Respondent). The Registered Nurse
24 License, was in full force and effect at all times relevant herein, and expired on July 31, 2012, and
25 has not been renewed.

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JURISDICTION

3. This Accusation is brought before the Board of Registered Nursing (Board), Department of Consumer Affairs, under the authority of the following laws. All section references are to the Business and Professions Code ("Code") unless otherwise indicated.

4. Section 2750 of the Code provides, in pertinent part, that the Board may discipline any licensee, including a licensee holding a temporary or an inactive license, for any reason provided in Article 3 (commencing with section 2750) of the Nursing Practice Act.

5. Section 2764 of the Code states:

"The lapsing or suspension of a license by operation of law or by order or decision of the board or a court of law, or the voluntary surrender of a license by a licensee shall not deprive the board of jurisdiction to proceed with any investigation of or action or disciplinary proceeding against such license, or to render a decision suspending or revoking such license."

6. Section 118, subdivision (b), of the Code states:

"The suspension, expiration, or forfeiture by operation of law of a license issued by a board in the department, or its suspension, forfeiture, or cancellation by order of the board or by order of a court of law, or its surrender without the written consent of the board, shall not, during any period in which it may be renewed, restored, reissued, or reinstated, deprive the board of its authority to institute or continue a disciplinary proceeding against the licensee upon any ground provided by law or to enter an order suspending or revoking the license or otherwise taking disciplinary action against the licensee on any such ground."

7. Section 2761 of the Code states:

"The board may take disciplinary action against a certified or licensed nurse or deny an application for a certificate or license for any of the following:

(a) Unprofessional conduct, which includes, but is not limited to, the following:

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(d) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violating of, or conspiring to violate any provision or term of this chapter [the Nursing Practice Act] or regulations adopted pursuant to it.

...

8. Section 2762 of the Code states:

"In addition to other acts constituting unprofessional conduct within the meaning of this chapter [the Nursing Practice Act], it is unprofessional conduct for a person licensed under this chapter to do any of the following:

...

(b) Use any controlled substance as defined in Division 10 (commencing with Section 11000) of the Health and Safety Code, or any dangerous drug or dangerous device as defined in Section 4022, or alcoholic beverages, to an extent or in a manner dangerous or injurious to himself or herself, any other person, or the public or to the extent that such use impairs his or her ability to conduct with safety to the public the practice authorized by his or her license."

9. Section 125.3 of the Code provides, in pertinent part, that the Board/Registrar/Director may request the administrative law judge to direct a licensee found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

CONTROLLED SUBSTANCES

10. **Heroin**, a semisynthetic drug derived from Morphine, is a Schedule I controlled substance as designated by Health and Safety Code section 11054, subdivision (c)(11).

11. **Cocaine**, and any cocaine base, is a narcotic drug according to Health and Safety Code section 11019, subdivision (e). It is a Schedule I controlled substance, as designated in Health and Safety Code section 11054, subdivision (f)(1), and a Schedule II controlled substance, as designated in Health and Safety Code section 11055, subdivision (b)(6). It is categorized as a dangerous drug according to Business and Professions Code section 4022.

12. **Codeine** is a Schedule II controlled substance as designated by Health and Safety Code section 11055, subdivision (b)(1)(G).

13. **Morphine** is a Schedule II controlled substance as designated by Health and Safety Code section 11055, subdivision (b)(1)(L).

FACTS

14. Respondent was employed as a Registered Nurse at Mercy Hospital from at least 2005 until March of 2011. Respondent took a leave of absence from February 11, 2011 to approximately March 11, 2011.

15. On March 25, 2011, Respondent began his shift at 4:00 p.m. at the emergency room of Mercy Hospital and assumed the care of three patients.

16. On that same date, at approximately 5:00 p.m., charge nurse SS was supervising Respondent and noticed that Respondent had failed to discharge a patient in a timely manner even after he reminded Respondent to do so. Charge nurse SS also noticed that Respondent was standing at the nurses' station leaning against the counter as he was dozing in and out of sleep. His eyes were closed and his head was bouncing up and down as if he was trying to stop himself from falling asleep. Respondent appeared to be agitated while he was walking around and, when he would stop walking, he would immediately dose off. SS believed Respondent was under the influence of some medication or drug and unable to provide adequate care for his patients at the time. Charge nurse SS was approached by staff members who advised him that Respondent appeared impaired. At approximately 5:40 p.m., charge nurse SS confronted Respondent regarding his behavior. Respondent indicated that he was fine and was just tired.

17. On that same date, Dr. B was on duty as the emergency physician at the hospital. During his shift, Dr. B had been approached by staff members advising him that Respondent appeared impaired. Dr. B began to observe Respondent's behavior and noticed that Respondent needed to be in constant motion or he would drift off to sleep within a few seconds. Respondent would try not to fall asleep by going from task to task without finishing any particular task, including attempting to chart on the computer. When Respondent noticed Dr. B observing him, Respondent advised Dr. B that he had a hard time waking up, and then went to get a soda. Dr. B then observed Respondent pouring a soda into a small cup and before the cup was full, Respondent dosed off and almost spilled the soda. When Dr. B confronted Respondent regarding

1 his behavior, Respondent indicated that he was tired from his children keeping him up at night.
2 Dr. B observed that Respondent's eyes were glassy and his pupils were very constricted.

3 18. At approximately 5:50 p.m., Dr. B, accompanied by charge nurse SS, asked
4 Respondent to go into the medication room. Respondent was again confronted by Dr. B and
5 charge nurse SS about his condition. Respondent began to sweat profusely and became shaky.
6 Respondent denied taking drugs. Dr. B advised Respondent that based on his experience,
7 Respondent appeared to be intoxicated and that patients and staff were complaining about
8 Respondent's behavior. Respondent stated that he was tired and needed some coffee to get going.
9 Dr. B advised Respondent that he would not be allowed to care for patients in his condition and
10 requested that Respondent submit to a drug test. Respondent agreed to take the test, however,
11 when Dr. B went to arrange the test and charge nurse SS went to call the director of the Hospital,
12 Respondent fled the hospital before taking the test.

13 19. On that date, Respondent left the hospital and abandoned the three patients he was
14 treating. Prior to leaving the hospital, Respondent did not hand over the care of his patients, did
15 not report to any staff about the status of his patients, and did not report the fact that he would be
16 leaving.

17 20. Mercy Hospital terminated Respondent on March 30, 2011 as a result of the March
18 25, 2011 incident.

19 21. In late June of 2011, Respondent became employed at San Joaquin Community
20 Hospital. Respondent was asked to take a drug test after a drug discrepancy was found.
21 Respondent tested positive for Morphine and Codeine and was terminated from his employment.

22 22. In a subsequent interview with a Board investigator in June of 2012, Respondent
23 admitted to using Heroin heavily during March of 2011. He admitted to using Heroin for several
24 months and using up to a gram of Heroin a day. Respondent also admitted to using cocaine
25 during this period. Respondent admitted that he last used cocaine and Heroin on July 13, 2011.
26 He further admitted that he endangered his patients by being under the influence while on duty.

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1 **FIRST CAUSE FOR DISCIPLINE**

2 **(Unprofessional Conduct- Dangerous or Injurious Use of Controlled Substances)**

3 23. Respondent is subject to disciplinary action for unprofessional conduct under section
4 section 2761, subdivision (a), and section 2762, subdivision (b) as follows:

5 (a) On or about March 25, 2011, while on duty as a nurse at the Mercy Hospital
6 located in Bakersfield, California, Respondent used and was under the influence of a controlled
7 substance, Heroin and Cocaine, in a manner dangerous to himself, his patients, and others, as
8 demonstrated by Respondent's constricted pupils and slurred speech. Complainant also refers to
9 and incorporates all the allegations contained in paragraphs 14 through 20, and paragraph 22
10 above, as though fully set forth herein;

11 (b) In late June of 2011, while on duty as a nurse at San Joaquin Community
12 Hospital, Respondent used and was under the influence of a controlled substance and, following a
13 drug test, tested positive for Morphine and Codeine. Complainant also refers to and incorporates
14 all the allegations contained in paragraph 21 above, as though fully set forth herein.

15 **SECOND CAUSE FOR DISCIPLINE**

16 **(Violating Nursing Practice Act)**

17 24. Respondent is subject to disciplinary action under section section 2761, subdivision
18 (d), in that Respondent violated the Nursing Practice Act in that Respondent used and was under
19 the influence of a controlled substance in a manner dangerous to himself, his patients, and others.
20 Complainant also refers to and incorporates all the allegations contained in paragraphs 14 though
21 22 above, as though fully set forth herein.

22 **PRAYER**

23 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
24 and that following the hearing, the Board of Registered Nursing issue a decision:

25 1. Revoking or suspending Registered Nurse License Number 644858, issued to David
26 Michael Gardner;

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1 2. Ordering David Michael Gardner to pay the Board of Registered Nursing the
2 reasonable costs of the investigation and enforcement of this case, pursuant to Business and
3 Professions Code section 125.3;

4 3. Taking such other and further action as deemed necessary and proper.

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6 DATED: October 11, 2012



for LOUISE R. BAILEY, M.ED., RN
Executive Officer
Board of Registered Nursing
Department of Consumer Affairs
State of California
Complainant

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